

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000223-MR

"CAT" SIZEMORE

APPELLANT

v. APPEAL FROM CLAY CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
ACTION NO. 97-CR-000046

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: JOHNSON, KNOX, AND SCHRODER, JUDGES.

JOHNSON, JUDGE: "Cat" Sizemore (Sizemore) has appealed from the final judgment entered on January 20, 1998, in the Clay Circuit Court which convicted her on two counts of trafficking in a controlled substance in the first degree (Kentucky Revised Statutes (KRS) 218A.1412), and sentenced her to prison to serve a term of five years on each count, the terms to run concurrently. Having reviewed the record and considered the parties' arguments, we affirm.

The events which led to Sizemore's indictment and conviction occurred in July 1996. Kentucky State Police Trooper Doug Asher (Trooper Asher) testified that on July 7, 1996, and

July 25, 1996, he sent Bert Smith (Smith), a Clay County resident who he was using as a confidential informant, to Sizemore's residence to purchase cocaine. During the first transaction, Smith purchased about one-half gram of cocaine which was valued at \$40, and during the second transaction he purchased twice that amount. Trooper Asher provided Smith with the money for the "buy" and outfitted him with a device to record the transactions. Trooper Asher had also used Smith for several similar transactions in the area that summer. Smith was paid \$50 for every transaction which resulted in a misdemeanor charge and \$100 for a felony charge. In the nine-month period in which Smith worked with the state police, he earned nearly \$8,000.

Sizemore was indicted on May 22, 1997. Prior to trial, Sizemore moved, pursuant to Kentucky Rules of Criminal Procedure (RCr) 7.24, for an order requiring the Commonwealth to provide her with a "complete copy of the file compiled by the Kentucky State Police reflecting its relationship with the confidential informant(s)[.]" On June 16, 1997, the trial court ordered that the Commonwealth provide Sizemore with the "name and whereabouts of the confidential informant(s) referred to in the indictment and the particulars of all agreements between the informant(s) and the Kentucky State Police;" however, it did not order the Commonwealth to turn over its entire file pertaining to Smith and his activities.

On September 2, 1997, Sizemore again moved the trial court to order the Commonwealth to produce its "entire file maintained by the Kentucky State Police and all other cooperating

agency(ies), reflecting the confidential informants' involvement in law enforcement activities[.]” The trial court ordered the Commonwealth to produce the file for an in camera inspection. After its in camera review of the file, the trial court ordered only that the Commonwealth disclose to Sizemore the dates and amount of payments to Smith and whether the payments were related to the purchase of drugs or alcohol.

Sizemore was tried in January 1998. Trooper Asher testified that Smith volunteered to act as an informant and came to the police post at London, Kentucky, where he was interviewed prior to being used in that capacity. He related the financial terms of the arrangement with Smith and stated that the Commonwealth had not made any promises to help Smith with his personal legal problems in exchange for his undercover work. Trooper Asher detailed the procedures he employed when working with Smith. He testified that he would follow Smith, or drive by the target's house, to insure that Smith went where he was assigned and that sometimes he observed Smith from a distance and/or listened to the transaction with a transmitter. After each transaction, he stated he would meet Smith at a pre-arranged location and obtain the evidence and the tape made of the “buy.” Trooper Asher testified that he took the evidence to the police post where he identified it and placed it in the evidence room for safekeeping. Trooper Asher testified that Smith made purchases of cocaine from Sizemore on July 7 and July 25, 1996.

Smith also testified that he made two purchases from Sizemore in July 1996, although he believed the second

transaction occurred on July 16. During his testimony, the tape recordings of the two transactions were played for the jury. Trooper Asher's voice is heard at the beginning of each tape identifying the date, time and participants of the activity. Smith identified the voices on the tapes, including those of himself and Sizemore. Smith admitted that he was a convicted felon, that he had earned approximately \$8,000 working for the police for approximately nine months in 1996 and 1997, and that he had been arrested thirteen times during the same time frame. He further stated that the Commonwealth had not given him any special treatment in resolving his own criminal troubles in consideration for his involvement with the drug operation. On cross-examination, Smith testified that he did not hesitate to lie whenever convenient.

Sergeant Milton Baker (Sergeant Baker), the officer in charge of the evidence room at the London police post, testified that Trooper Asher placed the substances received from Smith in a sealed envelope and marked it for identification and that the evidence remained in that condition until taken to the state police lab for analysis. Carl Lawson, the chemist at the lab who actually tested the substance, testified that the envelopes were sealed when he received them and that the packets inside the envelopes contained cocaine.

Sizemore did not testify, but presented an alibi defense through other witnesses. Chuck Johns (Johns), who is married to Sizemore's niece, testified that Sizemore accompanied him, his wife, and his young step-son, on an outing to Pigeon

Forge, Tennessee, for the holiday (Independence Day) weekend, which included July 7, 1996, so that Sizemore could care for the child while he and his wife spent some time alone. He stated that they did not return Sizemore to her home in Manchester until approximately 11:00 p.m. on Sunday, July 7, about three hours after the time of the alleged drug buy. Sizemore attempted to introduce into evidence a document which purported to be a reservation confirmation from a hotel in Pigeon Forge. The trial court refused to allow the document into evidence on the basis that it was hearsay.

Charles Lovell (Lovell), Sizemore's son-in-law, and Lisa Wagers, a friend, both testified that they and Donna Lovell, Sizemore's daughter, and Sizemore, had gone to Richmond, Kentucky, at approximately 2:00 p.m. on July 25, 1996, to celebrate Lovell's birthday. Again, their testimony indicated Sizemore did not return home until many hours after the second drug transaction allegedly occurred.

The trial court denied Sizemore's motion for a directed verdict. It also overruled Sizemore's objection to the language in the instructions which allowed the jury to find her guilty if it believed that she sold cocaine to Smith "on or about" July 7, 1996, and "on or about" July 25, 1996. The jury found Sizemore guilty on both counts of first-degree trafficking and recommended that she be given the minimum sentence on each, with the sentences to run concurrently. Sizemore was sentenced accordingly, and this appeal followed.

Sizemore has raised several arguments in her appeal. First, she contends that the trial court erred in failing to require the Commonwealth to produce its entire file reflecting its relationship with Smith for her inspection and that such failure deprived her of her right to effectively cross-examine and impeach Smith. She contends that pursuant to RCr 7.24(2), the trial court should have allowed her to obtain the complete file maintained by the state police in order to prepare her defense. This rule reads as follows:

On motion of a defendant the court may order the attorney for the commonwealth to permit the defendant to inspect and copy or photograph books, papers, documents or tangible objects, or copies or portions thereof, that are in the possession, custody or control of the commonwealth, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. This provision does not authorize pretrial discovery or inspection of reports, memoranda, or other documents made by officers and agents of the commonwealth in connection with the investigation or prosecution of the case, or of statements made to them by witnesses or by prospective witnesses (other than the defendant).

Sizemore has not cited a single authority that interprets RCr 7.24(2) to require the Commonwealth to make its entire file concerning a confidential informant available to a defendant. In this case, the file would include information concerning targets other than Sizemore that was gathered during the nine-month, drug-related investigation, since Smith made over 80 drug purchases. We agree with the Commonwealth's argument that the discovery rule, which specifically provides that it does not "authorize pretrial discovery or inspection of reports,

memoranda, or other documents made by officers and agents . . . in connection with the investigation," does not contemplate that the Commonwealth will be required to release its entire investigative file revealing targets other than the defendant merely to allow a defendant to search for evidence bearing on the informant's credibility. See Moore v. Commonwealth, Ky., 634 S.W.2d 426 (1982), and Wilson v. Commonwealth, Ky., 836 S.W.2d 872 (1992) (requested information including "all correctional institution files of the [prosecution's] witness," the organizations to which the witness ever belonged, "any information [the witness] may have provided to any governmental authority in any jurisdiction in any case," "any prior instances of [the witness] ever lying or exaggerating" "clearly exceed any possible exculpatory material or information properly attainable under RCr 7.24").

There can be no dispute that Sizemore was entitled to discover evidence of "any understanding or agreement" between Smith and the Commonwealth as such evidence was "relevant to [the informant's] credibility." Giglio v. United States, 405 U.S. 150, 155, 92 S.Ct. 763, 31 L.Ed.2d 104, 109 (1972). We are satisfied that she was provided such evidence pursuant to the trial court's orders and that this evidence was presented to the jury. Further, as Smith was the Commonwealth's key witness against Sizemore, there is no question that any evidence which would reflect negatively on his credibility would be exculpatory in nature, and therefore, potentially discoverable. Rolli v. Commonwealth, Ky.App., 678 S.W.2d 800, 802 (1984); Eldred v.

Commonwealth, Ky., 906 S.W.2d 694, 701 (1994). For this reason, the trial court acted appropriately in viewing the file in camera. However, because the file was not made a part of the record on appeal, we are unable to review it to determine whether the trial court abused its discretion in ruling that only a portion of it be made available to Sizemore, but we must instead presume that the ruling was correct. See Harper v. Commonwealth, Ky., 694 S.W.2d 665, 668 (1985).

Next, relying on Byerly v. Ashley, Ky.App., 825 S.W.2d 286 (1991), Sizemore argues that the trial court erred by denying her motion for a directed verdict of acquittal on Count II of the indictment. Specifically, she contends that "discrepancies" in the Commonwealth's proof concerning the chain of custody in the substance allegedly purchased from her on July 25, 1995, "created sufficient doubt about her guilt to have justified the directed verdict[.]" The first alleged discrepancy Sizemore points to is Sergeant Baker's testimony that the evidence contained in Commonwealth's Exhibit #3--the cocaine Trooper Asher testified Smith purchased on July 25, 1996--was logged in the evidence room by Sergeant Biggerstaff on July 23, 1996. The second alleged discrepancy is evidence that the original name on the exhibit was not Sizemore's, but that of Betty Bengé (Benge).

The standard of our review of a directed verdict is well settled and is stated in Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991), quoting Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983), as follows: "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would

be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal."

The prosecutor explained each of the discrepancies to the jury. Trooper Asher testified that he had merely made a mistake when he wrote Bengé's name on the envelope and that he immediately recognized his mistake and crossed out Bengé's name and corrected it to identify Sizemore as the source of the contents of the envelope. As to the date the evidence was logged in, the prosecutor suggested to the jurors that Sergeant Barker had misinterpreted Sergeant Biggerstaff's handwriting and urged the jurors to examine the tracking form inside Exhibit #3 to determine for themselves whether the date on the form actually read July 23, or July 25. Clearly, these discrepancies did not destroy the Commonwealth's case against Sizemore for trafficking in cocaine on July 25, 1996. As our Supreme Court recently reiterated, "it is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification." Rabovsky v. Commonwealth, Ky., 973 S.W.2d 6, 8 (1998). Unlike Byerly, supra, where there was no attempt to establish a chain of custody of urine samples once they were delivered to the lab for analysis, the chain of custody of the cocaine purchased from Sizemore was established at every juncture. It was clearly for the jury to decide whether Trooper Asher received the substance from Betty Bengé or Sizemore, and/or whether it was logged in on July 23, or July 25.

Sizemore's third allegation of error concerns the trial court admitting into evidence of the audio tapes made by Smith

during the transactions. Sizemore insists that a proper foundation was not laid for the admission of the tapes because there were "no forms prepared to establish the custody of the tape recordings from the time they were received by Asher from Smith until they were offered in evidence," and because Trooper Asher did not know Sizemore and could not identify her voice and Smith "was not asked to identify or confirm the identity of the voices on the tape[s]."

In Woods v. Commonwealth, Ky., 793 S.W.2d 809 (1990), the Supreme Court, quoting Lawson, The Kentucky Evidence Law Handbook, § 7.10 (2d ed., 1984), observed that "the trial court has broad discretion in determining admissibility [of audio tapes] and that [its] judgment will not be disturbed on appeal if there is sufficient evidence of the accuracy of the recording to assure its reliability." Although, as Sizemore argues, there were no "forms" establishing the whereabouts of the tapes between the date they were recorded and the trial, there was evidence from Trooper Asher and Sergeant Baker pertinent to the issue. Trooper Asher testified that his practice in working with the informant was to obtain the tape from Smith immediately after each buy, take it to the police post and mark it with the number assigned to that case, and place it in the evidence room until needed for trial. Unlike the drugs which had to be sent out for testing, Trooper Asher and Sergeant Baker testified that the audio tapes stayed in the evidence room until Sergeant Baker brought them to the trial. Trooper Asher identified the two audio tapes as those

recorded by Smith on July 7, and July 25, 1996, and testified that they had not been altered.

Further, contrary to Sizemore's assertions, Smith was asked by the prosecutor to identify the voices on the tapes and he unequivocally testified that the voice of the person from whom he was heard purchasing cocaine belonged to Sizemore. Thus, we find no merit to Sizemore's argument that the trial court abused its discretion in admitting the tapes into evidence.

Next, Sizemore argues that the trial court erred in refusing to allow her to offer into evidence a confirmation from the Park Tower Inn in Pigeon Forge, Tennessee, which indicated that Angel Johns, Sizemore's niece, had reserved one room with two queen-size beds for two nights to begin on July 5, 1996, and end at 11:00 a.m. on July 7, 1996. The Commonwealth argued to the trial court that the document was irrelevant as it did not establish that the Johnses--much less, Sizemore-- actually stayed at the hotel, but indicated only that they had a reservation at the hotel. The Commonwealth also argued that the document should not be admitted as it had not been disclosed to the Commonwealth prior to trial. The trial court sustained the Commonwealth's objection to the introduction of the document, but for a different reason--that is, that it was hearsay.

Kentucky Rules of Evidence (KRE) 801 defines "hearsay" as "a statement [an "oral or written assertion"], other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay evidence is not admissible unless it falls into a

"recognized hearsay exception." Kinser v. Commonwealth, Ky., 741 S.W.2d 648, 655 (1987) (Stephens, dissenting); KRE 802. Sizemore argues that the trial court erred in excluding the document from evidence because it was not offered "to prove the truth of the statements asserted therein." We disagree. The document was obviously offered as circumstantial evidence to support Johns' testimony that he, his family and Sizemore were in Pigeon Forge between July 5 and July 7, 1996. Accordingly, we find no abuse of the trial court's discretion in refusing to allow the document into evidence.

Even if the document did not constitute hearsay, any error in its exclusion would have been harmless for the reasons argued to the trial court by the prosecutor. The document was not a receipt, but merely a confirmation that Angel Johns had made a reservation at the hotel. More importantly, the document did not relate to the commission of the offenses, but merely dealt with Sizemore's alleged whereabouts prior to the time one of the drug purchases was alleged to have been committed. While the document may have had corroborating effect on Johns' testimony, it certainly was not evidence from which the jury could infer that Sizemore was not guilty of selling cocaine to Smith at 8:00 p.m. on July 7, 1996, many hours after the 11:00 a.m. check-out time indicated on the document.

Finally, Sizemore argues that she was prejudiced by the trial court's instructions to the jury. Specifically, she objected to the use of the words "on or about" prior to each of the two dates the offenses allegedly occurred. Sizemore admits

that she has "been unable to locate a reported opinion which directly discusses the issue." Further, the instructions given by the trial court are identical to those contained in 1 Cooper, Kentucky Instructions to Juries § 9.11A (4th ed., 1999).

Sizemore has cited cases which hold that a "variance between the indictment and the proof which misleads the accused in making or preparing his defense is fatal." Davis v. Commonwealth, Ky., 399 S.W.2d 711, 713 (1965). While most of the Commonwealth's proof did not vary from the indictment, Smith did testify that the second drug buy from Sizemore occurred on July 16, 1996. However, neither the prosecutor, nor any other witness for the Commonwealth ever suggested that the transaction actually occurred on that day. The testimony of Trooper Asher, the date heard at the beginning of each tape made of the drug buys, and the exhibits, all indicate that the drugs were purchased on July 7, and July 25, 1996. At no time did the prosecutor ever suggest to the jury that it could believe Sizemore's alibi witnesses and still find her guilty of trafficking on days other than July 7 and July 25, 1996. Sizemore's problem was not that the trial court's instructions undermined her defense, or that there were inconsistencies between the dates in the indictment and the proof, but that her alibi did not credibly address the dates on which she was charged with trafficking in cocaine. For these reasons, we find no error in the instructions under which Sizemore was found guilty.

Accordingly, the judgment of the Clay Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Hon. Stephen Charles
Manchester, KY

BRIEF FOR APPELLEE:

Hon. A. B. Chandler, III
Attorney General of Kentucky
Frankfort, KY

Hon. Dana M. Todd
Assistant Attorney General
Frankfort, KY